No. 84-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON & JOHNSON,

Petitioner,

—v.—

STANLEY McDONALD, NORMAN R. HAGFORS, and CLAYTON JENSEN,

Respondents.

REPLY BRIEF OF PETITIONER JOHNSON & JOHNSON IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I. Plaintiffs-Respondents Do Not Dispute That A Constitutional Conflict Between the Circuits Has Been Created Unless the Eighth Circuit Actually Made A Determination of Separability of the Contract and Fraud Issues

Stripped of vitriolic rhetoric, plaintiffs' brief essentially agrees with J&J's position: unless the Eighth Circuit actually determined "that fraud issues were sufficiently distinct and separable from contract issues so that a new trial could be had on the fraud claim alone without prejudice to J&J" (p. 14)[1], a serious constitutional conflict among the circuits has been created. They admit that a retrial is constitutionally required on "those issues that may have been affected by impropriety in the trial" (p. 16). They assert time and time again, as if

1 Except where indicated otherwise, references herein to "p. ____" refer to the pages of Respondents' brief in opposition to the petition for a writ.

reiteration will make the assertion come true, that the Eighth Circuit in fact "made a determination" that the issues underlying plaintiffs' alternate contract theory were so distinct and separable from those underlying their alternate fraud theory that the contract judgment could be constitutionally affirmed (*See*, *e.g.* pp. 8, 14, 15, 16, 17 and 20).

II. The Eighth Circuit Did Not Make A Determination of Separability

Plaintiffs do not and cannot claim that the Eighth Circuit made any *explicit* determination of separability. To the contrary, that Court held (A-13):

> "The injuries to the plaintiffs flowed from the alleged fraud *and* breach of contract, not from suppressed competition in the TENS or other product markets; thus, the plaintiffs did not suffer a *Brunswick* 'antitrust injury.' "[2]

Nevertheless, in recognition of the severe constitutional problem created by the lack of such a determination, plaintiffs are forced to argue that the Eighth Circuit "necessarily found that there was no improper use of the suppression theory, or taint resulting therefrom" (p. 8), and that "there is no reason to believe that the Court was ignorant of that decision [*Gasoline Products*] or failed to follow it" (p. 19). This argument constitutes circular reasoning of the purest sort. Obviously, if a presumption exists the Eighth Circuit always follows *Gasoline Products* unless it states to the contrary, that is the end of the inquiry. Very few courts, however, state that they are ignoring a constitutional mandate, especially when they are clearly doing so.

III. Plaintiffs' Own Pleadings and Presentation of Their Claim Preclude Any Conceivable Inference That The Eighth Circuit Found or Could Have Found That The Contract and Fraud Issues Were Distinct and Separable

The Eighth Circuit was compelled by precedent to reverse the verdicts on the fraud theory because of obvious pollution

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2 Except where otherwise noted herein emphasis has been added.

by the improperly presented suppression argument. This same pollution likewise requires reversal of the identical claim, based on identical facts, submitted under the contract label. The same allegations used to prove promissory fraud were relied upon by plaintiffs to prove breach of contract. The critical paragraph of the Amended Complaint (printed in its entirety herein as Appendix G) for both the fraud and contract claims is paragraph 11:

> "11. In the course of the negotiations between the parties and in connection with the execution of said agreements of September 20, 1974, and in explanation and clarification of the language set forth in paragraph 10(a) of said agreement, as recited above, defendant made the following *representations, statements, and undertakings* to plaintiffs:
>
> (a) That defendant was certain that, over the five year payment period set forth in the agreement, plaintiffs would receive the maximum amount of $7,000,000.00 provided for in said agreement, and that there would be no problem in plaintiffs' receiving said $7,000,000.00 in exchange for their stock.
>
> (b) That not only was defendant confident that plaintiffs would receive $7,000,000.00 for their stock, but that plaintiffs would in fact receive $7,000,000.00.
>
> (c) That defendant would provide capitalization and financing for StimTech in an amount sufficient to make StimTech a profitable and successful business, with earnings at least sufficient to provide plaintiffs with the full $7,000,000.00 payment for their stock.
>
> (d) That defendant would provide StimTech with experienced, knowledgeable, and competent management, so as to ensure StimTech's profitability.
>
> (e) That defendant would provide StimTech with marketing assistance through the use of other companies owned by defendant, through the introduc-

tion of StimTech products into the athletic market for sports related injuries, through introduction of StimTech's products into the defendant's worldwide marketing network, which would provide StimTech with marketing and distribution in all but two countries of the world (Outer Mongolia and Siberia).

(f) That defendant would provide StimTech with sufficient financial, managerial, and technical expertise to bring about the development of new products and the technical advancement of other products.

(g) That defendant would provide comparable money, marketing, management, and technical assistance to Devices Implants Limited, StimTech's licensor, which defendant was also acquiring at substantially the same time as defendant acquired StimTech."

(h) That defendant would develop to a position of technical excellence and industry leadership StimTech's TENS devices, and in particular the electrode used therein, and StimTech's pacemakers."

For their breach of contract claim plaintiffs went on to allege:

"BREACH OF CONTRACT

21. The conduct, practices, and activities of defendant described above constitute a material breach of the stock purchase agreement between the parties dated September 20, 1974, and further constitute a material breach of each of the *statements, representations, and undertakings set forth in paragraph 11 above*, and made expressly or implicitly a part of said stock purchase agreement of September 20, 1974, for which breach plaintiffs are entitled to recover damages in an amount equal to at least $5.7 million dollars."

In the paragraph immediately following, the plaintiffs went on to replead *these same allegations* under a fraud theory:

"FRAUD AND MISREPRESENTATION

22. The conduct, practices, and activities of defendant *described above constitute misrepresentation*, for which plaintiffs are entitled to damages in the amount of at least $5.7 million dollars, in that defendant made one or more untrue statements of material fact, or failed to disclose one or more matters of material fact, knowing the falsity thereof or the misleading nature of said nondisclosure, and plaintiffs relied thereon substantially to their detriment and damage in said amount of at least $5.7 million dollars."

Not only did the amended complaint on which the action was tried plead fraud and contract as purely alternative theories based upon the same set of operative facts,[3] but the plaintiffs have consistently during the entire course of this case taken the position that these claims, as well as the claim under § 1 of the Sherman Act (Amended Complaint ¶ 24 at G-15-16), are alternate theories based upon these same facts. Time and time again plaintiffs have so stated (see Petition for Certiorari, pp. 9-10).

At the oral argument of this appeal to the Eighth Circuit Mr. Alioto urged that court, just as he had urged the jury below, that the promises sued on constituted both fraud and breach of contract (p. 64):

> "So what they did was very simple, in our view, and presented, we think, to the jury very simply. And that is that in order to protect their multi-billion dollar investment in drugs, Tylenol, principally, and the new drug that was coming on, they had to suppress this particular product. And the way to do it was to purchase the principal—or attempt to purchase the principal manufacturer in the field. And the way they do that is promise them anything, doesn't make any difference—that was the fraud—enter into a contract with them, and they don't do it. That's what they did. That's precisely what they did."

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3 No further amendments to the pleadings were made.

IV. The Eighth Circuit Could Make A Determination of Separability Because The Suppression Charge As Presented Through The Alternate Inflammatory Antitrust Claim Polluted Both the Fraud and Contract Theories to An Equal Extent

Plaintiffs make the incredible assertion that "J&J is wrong when it says that the Eighth Circuit found the plaintiffs' suppression theory to be invalid" (p. 21). To the contrary, blatant invalidity of that theory and its capacity for prejudice were the reason for reversing the fraud verdict. Plaintiffs seek to characterize the antitrust claim as some sterile, but legally invalid charge whose dismissal had no effect on the common law claims. The Eighth Circuit, however, did not regard it as such. On the contrary, it stated (A-25):

> "Our finding that these plaintiffs do not have standing to punish for antitrust violations merely *enhances* the prejudicial effect of the [suppression] argument.
>
> We therefore find the jury's $25 million punitive damages award to have been largely based upon plaintiffs' prejudicial and legally unfounded arguments."

Thus the inflammatory antitrust claim was a vehicle for proving what plaintiffs conceived to be "suppression." This suppression charge, as plaintiffs point out, was the essence of the contract claim (p. 3). Contrary to plaintiffs' assertion (p. 12), the Eighth Circuit in dismissing the antitrust claim did merely limit its holding to lack of standing, but explicitly held that "J&J had no duty to competitors or consumers to promote its own product. This is an internal, private business decision" (A-16). This bogus duty, however, was the bedrock of plaintiffs' so-called suppression theory. It was the breach of this inflammatory antitrust duty that was used to establish the "suppression."

Not even plaintiffs can bring themselves to discuss their principal weapon for successfully branding J&J as guilty of such suppression—the illegal *per se* instruction. Even the dissent in the Eighth Circuit in rejecting such a motion recog-

nized that such a *per se* rule had never been recognized by any "case law or secondary authority" (A-30). It was beyond legitimate dispute and the jury in fact found that J&J's acquisition of StimTech did not substantially lessen competition in the TENS market,[4] but under this illegal *per se* charge if the jury found that TENS "was potentially competitive with defendant's products [i.e. analgesic drugs]" and if "defendant intentionally suppressed TENS from entering a substantial market, then defendant has committed a violation of § 1 without regard to any considerations of reasonableness or effects in the relevant market" (Tr. 12,740-41). Stated differently, this illegal *per se* charge required J&J to affirmatively promote TENS against analgesic drugs, and if the jury was of the hindsight opinion that it did not do so, it was guilty *per se* of such suppression.

This prejudicial charge was further compounded by the charge that plaintiffs could prove the requisite conspiracy under § 1 by showing that J&J was "combining or acting in concert with one or more of the following entities: StimTech; Devices; Johnson & Johnson Development Corporation; McNeil Labs; McNeil Consumer Products; or the Patient Care Division of the Domestic Operating Company." (Tr. 12,714). All of these were wholly-owned subsidiaries of J&J and obviously J&J acted "in concert" with them. This Court's recent decision in *Copperweld Corp. v. Independent Tube Corp.*, ___ U.S. ___, 52 U.S.L.W. 4821 (June 19, 1984), flatly read such alleged intra-corporate "conspiracies" out of the antitrust law.[5]

Judge Lord then iced the cake by instructing the jury that they could infer an intentional decision by J&J not to have its

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4 The jury found that in acquiring StimTech J&J did not violate § 7 of the Sherman Act, 15 U.S.C. § 18. Thus whether J&J started its own TENS or entered the market through an acquisition is irrelevant for antitrust purposes.

5 Incredibly, in their supplemental brief in support of their own petition, No. 83-1659, plaintiffs assert that the *Copperweld* decision supports their position.

TENS company compete with its analgesic drug companies by "taking into account defendant's size, its marketing practices, the past uses defendant has made of its size in marketing practices, the magnitude and nature of defendant's advertising, defendant's experience, trade connections, personnel, abilities, resources, and patterns and practices in responding to competition" as "factors bearing on defendant's motive and intent in acquiring and operating StimTech, and defendant's ability to make StimTech profitable and successful, or to suppress it" (Tr. 12,738-39).

Plaintiffs themselves tell this Court that "the essence of the plaintiffs' claim in this case is that J&J acquired their business for the purpose and with the intent of suppressing that business" (Supplemental Brief of Petitioners, No. 83-1659, p. 5).[6] The inflammatory and prejudicially presented antitrust claim proved the "suppression" charge and use of that unfounded antitrust claim to prove "suppression" irremediably polluted both common law claims.

The Eighth Circuit in affirming judgment on the alternate contract claim did not discuss this "suppression" issue, and *a fortiori* it did not address the requirement of its being distinct and separable from the contract theory. It could not do so and give any semblance of rationality or for that matter, constitutionality, to its actions. The plaintiffs themselves recognize that the established constitutional rule is that a remand must be had on all claims where they have common or inseparable issues.

What the Eighth Circuit did here was to affirm on liability on plaintiffs' claims, and then give plaintiffs another opportu-

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6 In their brief in opposition to this petition, they likewise state (p. 3):

". . . J&J breached the acquisition agreement by willfully and *in bad faith suppressing* their business after the acquisition; and that entire course of conduct—acquiring the plaintiffs' business for the purpose of suppression—constituted a violation of the antitrust laws."

nity for enhancing their damages through another trial on that same claim. The assertion in plaintiffs' brief that "the majority necessarily found that there was no improper use of the suppression theory, or taint resulting therefrom" in effect recognizes that the Eighth Circuit had to make such a finding, but failed to do so (p. 8). Their own pleadings, their arguments and briefs, and the charges given at their behest by Judge Lord, prove that the Eighth Circuit necessarily could not have made such a finding. The result below creates a conflict of constitutional dimensions. It should be reviewed and reversed in order to assure fair trials in all circuits where cases involving alternate or related claims are presented.

Finally, respondents do not respond at all to Point II of J&J's petition, which demonstrated that the Eighth Circuit's decision will chill technological development and innovation (Pet. 21-26). This Court should be sensitive to the potential misuse of the federal antitrust laws in ways that tend to stifle, rather than protect, competition, and should not allow plainly bogus antitrust suits to inflate garden variety common law actions into expensive trials (and verdicts) that, even if reversed, will tend to deter risk-taking and innovation. The legally non-sensical antitrust claim alleged in this action obviously influenced the fact-finding function of the jury, as the Court of Appeals itself acknowledged. The Court of Appeals' acquiescence in allowing, without explanation, the contract verdict to stand even after finding that plaintiffs' "suppression" claim was both wrong and prejudicial, provides every incentive for plaintiffs to bring equally bogus antitrust actions in the future. Indeed, as plaintiffs tacitly concede, their own attorneys are regularly involved in bringing or threatening such suits at this very time. *See* Pet. at 24-25.

Although respondents neither address nor answer the point, this case provides an excellent opportunity for the Court to prevent the abuse of federal antitrust claims from cluttering the federal courts and, more importantly, from inhibiting

crucial risk-taking efforts to acquire, develop and transfer technology.

Respectfully submitted,

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APPENDIX G TO PETITION FOR A WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

STANLEY MCDONALD, NORMAN R. HAGFORS and CLAYTON JENSEN, *Plaintiffs,* —vs— JOHNSON & JOHNSON, *Defendant.*	Civ. 4-79-189 FIRST AMENDED COMPLAINT JURY TRIAL DEMANDED

Stanley McDonald, Norman R. Hagfors, and Clayton Jensen, plaintiffs above named, bring this action for damages and for other relief, demand trial by jury of all issues properly triable thereby, and, for their *first amended* complaint, complain and allege as follows:

JURISDICTION AND VENUE

1. As appears more fully hereafter, plaintiffs are individuals and citizens of the State of Minnesota and the District of Minnesota, Fourth Division. Defendant is a corporation incorporated under the laws of the State of New Jersey, with its principal place of business in New Brunswick, New Jersey. The amount in controversy between the parties exceeds the sum of Ten Thousand and no/100 ($10,000.00) Dollars, exclusive of interest and costs. This complaint is filed and the jurisdiction

of this Court is invoked under 28 U.S.C. § 1332. As appears more fully hereafter, certain claims set forth herein involve violations of the Federal antitrust laws, such that the jurisdiction of this Court is also invoked under Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26) for damages caused by reason of, and for injunctive relief against, the violations by the defendant, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1), *Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2)*, and Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18). Jurisdiction for such claims is conferred upon this Court by 28 U.S.C. § 1337.

2. The defendant maintains an office, has an agent, transacts business, and/or is found within this judicial district, and, for the purpose of service of process, defendant is an inhabitant, and/or may be found, in New Brunswick, New Jersey. Many of the unlawful acts done pursuant to the violations and causes of action hereinafter alleged have occurred within the District of Minnesota. The interstate trade and commerce herein described are and have been carried out in part within said District of Minnesota.

THE PARTIES

3. The plaintiffs are three individuals who were principals of a business founded in 1970 and named Stimulation Technology, Inc. ("StimTech"), a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. As of 1973, plaintiffs were the sole shareholders in StimTech, which was engaged in the business of the development, manufacture, and marketing of prosthetic and therapeutic products that stimulate tissue as part of their function. Working with the University of Minnesota Department of Neurosurgery, and other neurosurgical groups, StimTech developed the first commercially available transcutaneous electrical nerve stimulators using modern technology. By 1974, StimTech's sales accounted for nearly 50% of the market in sales of transcutaneous electrical nerve stimulators. Also, in 1973, StimTech began the manufacture and marketing of implantable pacemakers, pur-

suant to a license from Devices Limited, a British corporation. As of September 20, 1974, plaintiff Hagfors owned 72,800 shares of common stock of StimTech, plaintiff Jensen owned 61,100 shares of common stock of StimTech, and plaintiff McDonald owned 61,100 shares of common stock of StimTech, for a total of 195,000 shares.

4. Defendant is a New Jersey corporation with its principal place of business in New Brunswick, New Jersey, and is engaged, *inter alia*, in the development, manufacture, and marketing on a worldwide basis of medical and surgical devices, supplies, and equipment. In addition, defendant manufactures and markets drug products, including, but not limited to, Tylenol and other related pain control drugs, *which are manufactured and marketed by McNeil Laboratories Incorporated, one of the defendant's wholly owned subsidiaries.* In 1973, through its wholly owned subsidiary, Johnson & Johnson Development Corporation, defendant acquired 115,000 shares of common stock of StimTech, and became a co-owner and minority shareholder of StimTech along with plaintiffs.

NATURE OF TRADE AND COMMERCE

5. The transcutaneous electrical nerve stimulator ("TENS") industry, which is a submarket of the pain control industry, and the pacemaker industry are nationwide and worldwide in scope, and involve the development, manufacture, and marketing of TENS devices and pacemakers. TENS devices are used for the control of pain through the transmittal of electrical impulses to skin and nerve tissues; cardiac pacemakers are electronic devices used to stimulate and assure regular and proper operation of the heart. In 1973-74, the TENS industry was in its relative infancy, and the pacemaker industry was approximately 10 to 12 years old. Sales of TENS devices worldwide in 1973 amounted to no more than $2,000,000.00; today sales of TENS devices worldwide approximate and probably exceed $50,000,000.00. In 1973, sales of cardiac pacemakers worldwide were approximately $100,000,000.00;

today, sales of cardiac pacemakers worldwide approximate and probably exceed $400 to $500,000,000.00 annually. Competitors in the TENS industry include, but are not limited to, StimTech and numerous other manufacturers and sellers of TENS devices. Also, to a degree, manufacturers and sellers of TENS devices have competed with, or have been potential competitors of, manufacturers and sellers of pain control drugs, such as defendant *and its subsidiary McNeil, with its line of Tylenol and related drugs. Other submarkets of the pain control industry in which TENS devices are and have been actual or potential competitors include the non-aspirin pain control market, the prescription pain control market, and the over-the-counter pain control market. Defendant has had, and continues to have, a dominant position and market power and/or monopoly power in the pain control industry and each of its various submarkets described herein.* Competitors in the cardiac pacemaker industry today include numerous manufacturers and sellers of cardiac pacemakers; StimTech, as set forth hereafter, no longer competes in said industry.

6. During the time period covered by this complaint:

a. Defendant, itself or through wholly owned subsidiaries, has sold and shipped substantial quantities of TENS devices, pain control drugs, and cardiac pacemakers in a continuous and uninterrupted flow of interstate commerce to its customers located in other states;

b. Substantial quantities of parts for said products sold by defendant, by itself or by wholly owned subsidiaries, were purchased for resale by defendant or its wholly owned subsidiaries from vendors located in other states, and were shipped to defendant or its wholly owned subsidiaries in a continuous and uninterrupted flow of interstate commerce;

c. Defendant established and operated manufacturing facilities in other states, and purchased for and shipped to said manufacturing facilities substantial quantities of parts and materials from vendors

located in other states, and said parts and materials were shipped to defendant's manufacturing facilities in a continuous and uninterrupted flow of interstate commerce.

7. Any restraint upon free competition in the manufacture or marketing of TENS devices or cardiac pacemakers in the United States necessarily and directly restrains and affects interstate commerce in and among the states.

CONDUCT GIVING RISE TO VIOLATIONS OF LAW

8. In 1973, defendant approached plaintiffs concerning the acquisition of an interest, in whole or in part, in StimTech. Pursuant to a series of negotiations, plaintiffs sold to defendant, through its wholly owned subsidiary, Johnson & Johnson Development Corporation ("Development"), 115,000 shares of capital stock of StimTech, the plaintiffs retaining 195,000 shares of StimTech. Subsequent to said transaction, defendant obtained representation on StimTech's Board of Directors, and familiarized itself further with the business and operations of StimTech.

9. During the period of defendant's ownership of a minority stock interest in StimTech, defendant entered into further negotiations with plaintiffs for the acquisition of the remainder of the common stock of StimTech. Pursuant to said negotiations, the parties entered into *a series of* agreements dated September 20, 1974, pursuant to which defendant acquired from the plaintiffs the remaining 195,000 shares of the outstanding capital stock of StimTech, and thereby became the sole stockholder of StimTech, *defendant employed the plaintiffs as executives of StimTech, and defendant prohibited the plaintiffs from otherwise competing in the pain control or pacemaker industry for the ensuing five years.*

10. Among the material terms of the purchase agreement of September 20, 1974 between the parties were the following:

"3. *Purchase Price*: The total purchase price for the Purchased Stock and the $30,000 for the non-compete

agreement provided for in Paragraph 8(a) hereof shall be computed as follows and shall be paid to each Stockholder in proportion to his respective percentage of the Purchased Stock as set forth in Paragraph 1:

> "(a) Three Hundred Thousand Dollars ($300,000.00) payable at the Closing ($270,000.00 for the Purchased Stock and $10,000 to each Stockholder in respect to the non-compete agreement);
>
> "(b) The balance of the purchase price for the Purchased Stock shall be based on and measured by the profits or sales of the Company with respect to each fiscal year in the Determination Period (as hereinafter defined). This amount in each such year shall be equal to the greater of (i) three (3) times the Net Profit Base (as hereinafter defined) for such year or (ii) five percent (5%) of the Net Sales (as hereinafter defined) for such year. In no event shall the total amounts payable pursuant to this Section 3(b) be less than $1,000,000 or more than $7,000,000."

* * *

"3.1 As used herein, the following terms shall have the following meanings:

> "(a) 'Determination Period' shall mean the five fiscal years of the Company commencing January 1, 1975 and ending on December 31, 1979; the parties having agreed that the fiscal year of the Company shall be changed to a calendar year basis. Notwithstanding the foregoing, the Determination Period shall end on such earlier date as Stockholders shall have received $7,000,000 in the aggregate pursuant to Section 3(b) and (c).

* * *

"8. *Further Covenants of Stockholders.*

"(a) In order to induce J&J [the defendant] to enter into this Agreement and to assure J&J that following such purchase none of the Stockholders will engage in any

business similar to the business carried on by the Company and its subsidiaries, each of the Stockholders agrees that for a period of five (5) years following the commencement of the Determination Period he will not, without the advance written consent of J&J, take part, directly or indirectly (either as principal, agent, employee, employer, consultant, stockholder, co-partner, licensor, licensee, or in any other individual or representative capacity whatever) in the manufacture, sale, distribution, or in research or development work relating to cardiac pacemakers and/or electrical pain control devices.

* * *

"10. *Miscellaneous.*

"(a) Stockholders and J&J recognize and acknowledge that the relationship which will exist between J&J, the Company and the Stockholders upon consummation of the transactions contemplated herein, must be based upon a high degree of mutual trust and confidence by the Company, Stockholders and J&J. Stockholders and J&J agree that each will at all times act in respect to its dealings with the Company and its operations, and subject to the exercise of reasonable business judgment, act in such a way as to promote to the extent reasonably possible the successful operation and growth of the Company."

11. In the course of the negotiations between the parties and in connection with the execution of said agreements of September 20, 1974, and in explanation and clarification of the language set forth in paragraph 10(a) of said agreement, as recited above, defendant made the following representations, statements, and undertakings to plaintiffs:

(a) That defendant was certain that, over the five year payment period set forth in the agreement, plaintiffs would receive the maximum amount of $7,000,000.00 provided for in said agreement, and that there would be no problem in plaintiffs' receiving said $7,000,000.00 in exchange for their stock.

(b) That not only was defendant confident that plaintiffs would receive $7,000,000.00 for their stock, but that plaintiffs would in fact receive $7,000,000.00.

(c) That defendant would provide capitalization and financing for StimTech in an amount sufficient to make a profitable and successful business, with earnings at least sufficient to provide plaintiffs with the full $7,000,000.00 payment for their stock.

(d) That defendant would provide StimTech with experienced, knowledgeable, and competent management,so as to ensure StimTech's profitability.

(e) That defendant would provide StimTech with marketing assistance through the use of other companies owned by defendant, through the introduction of StimTech products into the athletic market for sports related injuries, through introduction of StimTech's products into the defendant's worldwide marketing network, which would provide StimTech with marketing and distribution in all but two countries of the world (Outer Mongolia and Siberia).

(f) That defendant would provide StimTech with sufficient financial, managerial, and technical expertise to bring about the development of new products and the technical advancement of other products.

(g) That defendant would provide comparable money, marketing, management, and technical assistance to Devices Implants Limited, StimTech's licensor, which defendant was also acquiring at substantially the same time as defendant acquired StimTech.

(h) That defendant would develop to a position of technical excellence and industry leadership StimTech's TENS devices, and in particular the electrode used therein, and StimTech's pacemakers.

12. Said representations, statements, and undertakings were made to plaintiffs by and on behalf of defendant not once, but on numerous occasions, by top ranking officers and employees

of defendant, including, but not limited to, former Vice-Chairman of defendant's Board of Directors, Foster B. Whitlock; President of defendant s wholly owned subsidiary Johnson & Johnson Development Corporation, Charles M. Anderson; and defendant's Special Assistant to the Chairman of the Board, Dr. J. McConnell.

13. Each of said statements, representations, and undertakings was material to plaintiffs, and plaintiffs entered into said stock sale of September 20, 1974, in reliance upon each of said statements, representations, and undertakings.

14. At no time prior to the execution of said stock sale agreement on September 20, 1974, did defendant disclose to plaintiffs any of the following material facts:

(a) At the time defendant acquired plaintiffs' StimTech stock, and prior thereto, defendant had decided that immediately after acquiring ownership of StimTech, defendant would discharge plaintiff McDonald from his position as head of marketing for StimTech.

(b) At the time defendant executed said stock purchase agreement on September 20, 1974, and prior thereto, defendant had decided that it would remove from plaintiffs Hagfors and Jensen substantially all managerial responsibility and policymaking responsibility for StimTech.

(c) At the time defendant executed the stock purchase agreement on September 20, 1974, and prior thereto, defendant had decided that it would willfully and intentionally depress, minimize, and understate the revenues and earnings of StimTech during the five year Determination Period defined in said agreement, so as to minimize the compensation to be paid to plaintiffs for their stock.

(d) At the time defendant executed said stock purchase agreement on September 20, 1974, and prior thereto, defendant had determined that it would appropriate for itself and its other subsidiaries the goodwill, technical expertise, technology, and other assets of StimTech, at

least during the five year Determination Period described in said agreement, so as to obtain said assets of StimTech for itself without paying to plaintiffs more than the minimum compensation provided for in said stock purchase agreement.

(e) At the time defendant executed said stock purchase agreement on September 20, 1974, and prior thereto, defendant had determined that it would suppress the TENS products, knowhow, and business of StimTech, and would retard and eliminate both StimTech and plaintiffs individually as competitors of defendant's line of Tylenol and other pain control drugs.

15. Each of said nondisclosures was material to plaintiffs, and had plaintiffs been fully apprised of said nondisclosures and undisclosed intentions of defendant, plaintiffs would not have entered into said stock purchase agreement.

16. Each of the representations, statements, and undertakings set forth in paragraph 11 hereinabove proved to be false, and/or defendant failed to perform according to each of said representations, statements, and undertakings, in that, after acquiring the stock of plaintiffs pursuant to said agreement of September 20, 1974, defendant engaged in the following conduct:

(a) Defendant operated StimTech, and caused StimTech to be operated, in a manner such that StimTech has at no time realized revenues or earnings in any amount so as to entitle plaintiffs to payment for their stock in an amount greater than $1.3 million dollars, the minimum payment for plaintiffs' stock provided for in said agreement.

(b) Defendant totally failed to provide sufficient capitalization and financing for StimTech in an amount sufficient to make StimTech a profitable and successful business.

(c) The defendant totally failed to provide StimTech with experienced, knowledgeable, and competent manage-

ment, but instead provided StimTech with a series of executives lacking the necessary experience, knowledge, and ability to make StimTech a profitable business.

(d) The defendant totally failed to provide StimTech with marketing assistance through the use of other companies owned by defendant.

(e) The defendant totally failed to introduce StimTech products into the athletic market for sports related injuries.

(f) The defendant totally failed to introduce StimTech's products into the defendant's worldwide marketing network.

(g) The defendant totally failed to provide StimTech with sufficient financial, managerial, and technical expertise to bring about the development of new products and the technical advancement of other products so as to make said products competitive and marketable.

(h) The defendant totally failed to provide sufficient money, marketing, management, and technical assistance to Devices Implants Limited, StimTech's licensor for cardiac pacemakers, *used Devices Implants Limited as a vehicle for suppressing and eliminating StimTech sales and profits*, and in fact closed Devices Implants Limited, and thereby deprived StimTech of the benefits of its license with Devices Implants Limited, *as well as the benefits of international marketing for StimTech's products.*

(i) The defendant totally mismanaged and failed to develop the technology and marketing of StimTech's line of cardiac pacemakers, a product line of which defendant has now divested StimTech for depressed and inadequate consideration.

(j) The defendant totally failed, in a timely manner, to develop to a position of technical excellence and industry leadership StimTech's TENS devices.

(k) Shortly after acquiring plaintiff's stock, defendant discharged from active management plaintiff McDonald, and thereafter failed to provide adequate and competent marketing for StimTech's products.

(l) Also shortly after acquiring plaintiffs' stock, defendant deprived plaintiffs Hagfors and Jensen of all substantial management and policymaking responsibilities at StimTech, and failed to replace them with capable managers and policymakers.

(m) Defendant totally failed to develop a new electrode for StimTech's TENS devices, the rights to which StimTech held under an exclusive license that constituted a unique and valuable asset of StimTech, but instead appropriated for itself and its other companies the electrode technology of StimTech, and thereafter developed said technology through defendant's other companies, and refused to make said technology and advanced electrode available to StimTech, and thereby deprived StimTech of, and appropriated to itself, said unique and valuable asset.

(n) Defendant suppressed the products, knowhow, and business of both StimTech and plaintiffs individually, and thereby foreclosed and eliminated competition with defendant's line of Tylenol and other pain control drugs.

(o) In general, defendant has operated StimTech in such a manner as to make it unprofitable, stagnant, and unable to compete effectively in either the TENS device industry or the pacemaker industry, and StimTech has lost market penetration, sales, and profits.

17. At the time defendant made said representations, statements, and undertakings to plaintiffs, defendant did so knowing that said representations, statements, and undertakings were false and untrue and would not be honored by defendant, or, alternatively, defendant made said representations, statements, and undertakings in willful disregard of the truthfulness thereof or defendant's ability to perform in accordance therewith.

18. Subsequent to the acquisition of plaintiffs' stock on September 20, 1974, defendant's conduct towards StimTech and plaintiffs and defendant's failure to honor said representations, statements, and commitments to plaintiffs was willful and intentional, and done with the intent of appropriating to defendant the value of plaintiffs' stock and the assets of StimTech, without providing plaintiffs fair and adequate compensation therefor, contrary to defendant's agreement with plaintiffs, and was further done with the intent of insulating, protecting, and preserving defendant's sales and marketing of Tylenol and other related drugs from competition from TENS devices, *and with the intent of obtaining and maintaining a monopoly for defendant in the pain control industry, the non-aspirin pain control submarket, the prescription pain control submarket, and/or the over-the-counter pain control submarket, both in the United States and world-wide.*

EFFECTS OF CONDUCT AND INJURY TO PLAINTIFFS

19. As a direct and proximate result of the above described conduct of defendant, plaintiffs have suffered damage or injury to their business or property, in that: (1) plaintiffs have failed to receive for their StimTech stock its fair market value of *at least* $7,000,000.00, and have in fact received for said stock only $1.3 million dollars, an amount $5.7 million dollars less than the amount defendant agreed and represented it would pay for said stock; (2) plaintiffs have been deprived of an asset having an agreed and fair market value of *at least* $7,000,000.00, and have received as compensation therefor only $1.3 million dollars; (3) defendant has substantially destroyed the value of plaintiffs' StimTech stock and the business represented thereby, such that plaintiffs cannot be made whole by the recovery of said stock or said business; (4) defendant has appropriated and converted to itself the goodwill, technology, and other assets formerly owned by plaintiffs without providing fair, adequate, and promised compensation therefor, and has so altered and destroyed said assets that they cannot be returned to plaintiffs; and (5) by eliminating and suppressing

the ability of plaintiffs and StimTech to compete in the TENS or pain control industry, defendant has deprived plaintiffs of profits and the value of their business, which plaintiffs would otherwise have realized and enjoyed. Generally, plaintiffs have been damaged in the amount of at least $5.7 million dollars, the difference between the agreed and fair market value of plaintiffs' StimTech stock, as measured by the minimum reasonably anticipated earnings of StimTech, and the actual compensation received for said stock from defendant.

20. In addition, in acting to deprive plaintiffs of the value of their StimTech stock and the business associated therewith, without providing adequate compensation therefor, the defendant has unreasonably restrained and impaired competition in the pain control industry in which TENS devices are marketed, and in the cardiac pacemaker industry. *The defendant has also attempted and conspired to obtain a monopoly, and has in fact obtained and willfully maintained a monopoly, in the pain control industry and/or one or more of the various submarkets thereof described herein, both in the United States and worldwide.*

VIOLATIONS OF LAW ALLEGED
BREACH OF CONTRACT

21. The conduct, practices, and activities of defendant described above constitute a material breach of the stock purchase agreement between the parties dated September 20, 1974, and further constitute a material breach of each of the statements, representations, and undertakings set forth in paragraph 11 above, and made expressly or implicitly a part of said stock purchase agreement of September 20, 1974, for which breach plaintiffs are entitled to recover damages in an amount equal to at least $5.7 million dollars.

FRAUD AND MISREPRESENTATION

22. The conduct, practices, and activities of defendant described above constitute misrepresentation, for which plaintiffs are entitled to damages in the amount of at least $5.7

million dollars, in that defendant made one or more untrue statements of material fact, or failed to disclose one or more matters of material fact, knowing the falsity thereof or the misleading nature of said nondisclosure, and plaintiffs relied thereon substantially to their detriment and damage in said amount of at least $5.7 million dollars. Furthermore, because of the wanton, willful, and intentional nature of defendant's conduct, plaintiffs are entitled to punitive or exemplary damages in the amount of at least an additional $5.7 million dollars.

CONVERSION AND MISAPPROPRIATION

23. The conduct, practices, and activities of defendant described above constitute unlawful conversion of the property of plaintiffs and unjust enrichment by the defendant, in that defendant has unlawfully misappropriated, converted, and obtained the property of the plaintiffs without providing fair, reasonable, and sufficient compensation therefor, such that plaintiffs have been damaged in the amount of at least $5.7 million dollars. Furthermore, said conduct of defendant was done willfully, wantonly, and maliciously, such that plaintiffs are entitled to punitive or exemplary damages in the amount of at least an additional $5.7 million dollars.

SHERMAN ACT, SECTION 1

24. The conduct, practices, and activities of defendant described above constitute a combination, contract, or conspiracy between defendant and StimTech, *defendant and its wholly owned subsidiary, McNeil Laboratories, Incorporated, defendant and plaintiffs, defendant and Devices Implants Limited, and/or defendant and various officers and employees of StimTech, McNeil, and Devices, all* in unreasonable restraint of trade in the pain control industry *and/or the submarkets* thereof described herein, and/or the cardiac pacemaker industry, pursuant to which plaintiffs have suffered damage to their business or property in the amount of at least $5.7 million dollars, for which injury plaintiffs are entitled to

recover treble their actual damages, costs of suit, and a reasonable attorney's fee, pursuant to Section 4 of the Clayton Act.

CLAYTON ACT, SECTION 7

25. The conduct, practices, and activities of defendant described above constitute violations of Section 7 of the Clayton Antitrust Act, in that defendant's acquisition and operation of StimTech had the likelihood of substantially lessening competition, and in fact did substantially lessen competition, in the pain control industry *and/or the submarkets thereof described herein*, and/or the cardiac pacemaker industry; as a proximate result of which violation, plaintiffs sustained damage to their business and property in the amount of at least $5.7 million dollars, for which injury plaintiffs are entitled to recover treble their actual damages, their costs of suit, and a reasonable attorney's fee, as provided by Section 4 of the Clayton Act.

SHERMAN ACT, SECTION 2

26. The conduct, practices, and activities of defendant described above constitute the willful acquisition and maintenance by defendant of a monopoly in the non-aspirin pain control market; and further constitute a willful attempt by defendant to obtain a monopoly in the pain control industry and/or each of the various submarkets thereof described herein, all with an attendant dangerous probability of success; and further constitute a conspiracy to monopolize the pain control industry and/or each of the various submarkets thereof described herein, the co-conspirators being those described in paragraph 24 hereinabove, all with an attendant dangerous probability of success; all in violation of Section 2 of the Sherman Antitrust Act; pursuant to which plaintiffs have suffered damage to their business or property in the amount of at least $5.7 million dollars, for which injury plaintiffs are entitled to recover treble their actual damages, costs of suit, and a reasonable attorney's fee, pursuant to Section 4 of the Clayton Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand the following relief:

A. That the Court adjudge and decree that the defendant has committed the violations of law alleged in this complaint;

B. That the plaintiffs herein recover from defendant as damages for injury and loss to their business and property the amount of at least $5.7 million dollars, and such further punitive or exemplary damages, or treble damages, as the Court and jury shall determine;

C. That the plaintiffs herein recover from defendant the costs of this suit, and, to the extent available under Section 4 of the Clayton Act, a reasonable attorney's fee; and

D. That plaintiffs herein have such other, further and different relief as the nature of this case may require or the Court may deem just and appropriate.

Dated: This ____ day of November, 1979.

GRAY, PLANT, MOOTY & BENNETT
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